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Maryland. Constitutional Convention Commission.

Committee on Miscellaneous Provisions.

Reports, Initial - 8th.

STATE OF MARYLAND

CONSTITUTIONAL CONVENTION COMMISSION

INITIAL REPORT

OF THE

COMMITTEE ON MISCELLANEOUS PROVISIONS

Maryland Room
University of Maryland Library
College Park Md.

The Committee has reviewed and studied a number of the constitutional provisions assigned for our consideration. As our title perhaps suggests, several of the provisions within our purview may be readily recommended for deletion from the new Constitution, some because they are antiquated and outmoded, others because they are adequately covered by statutory law, and do not appear to require continued constitutional status.

Accordingly, we suggest that the Commission recommend deletion of each of the following sections of the Maryland Constitution:

(1) Article III, § 41

> Any citizen of this State, who shall after the adoption of this Constitution, either in, or out of this State, fight a duel with deadly weapons, or send, or accept a challenge to do so, or who shall act as a second, or knowingly aid or assist in any manner, those offending, shall, ever thereafter, be incapable of holding office of profit or trust, under this State, unless relieved from the disability by an act of the Legislature.

This provision, which has remained dormant since its inclusion in the 1867 Constitution may nevertheless have served to restrain those political aspirants who would challenge their rivals outside of the polls; but with the more sophisticated methods of the present day, it no longer serves its purpose. In any event, conviction for dueling (Assault with Intent to Murder, Art. 27, § 15) would be a felony, disqualifying the offender from holding most elective offices.

(2) Article III, § 43

> The property of the wife shall be protected from the debts of her husband.

At common law, a married woman had no dominion or control over her property, which was thereby subjected to her husband and his creditors. This deplorable state of affairs originally required constitutional reversal, which has since been implemented by statute (Code, Article 45) and judicial construction (i.e., Bishop v. Safe Deposit & Trust Co. of Baltimore, 170 Md. 615) to the point where constitutional assurance no longer seems necessary.

(3) Article III, § 44

> Laws shall be passed by the General Assembly, to protect from execution a reasonable amount of the property of the debtor, not exceeding in value, the sum of five-hundred dollars.

Article 83, §§ 8-14 of the Code contains the legislative response to this requirement, providing for a $100.00 exemption, and exemptions for clothing and instrumentalities of trades and professions in addition. Other exemptions are provided in Article 9, § 31 (wages to $100.00); Article 45, § 8 (insurance proceeds); Article 101, § 50 (Workmen's Compensation). There is little reason to believe that these long-standing protections to the debtor and his family would be disturbed as the result of the deletion of Article III, § 44, or that its objective of compelling the legislature to provide reasonable exemptions would be less attainable. The Legislature has inherent power to provide for exemptions without constitutional mandate or compulsion, and there is no reason to place a constitutional dollar limit on the amount. In all events, we do not believe this subject is of sufficient importance to warrant inclusion in the State Constitution.

(4) Article III, § 59

> The office of "State Pension Commissioner" is hereby abolished; and the Legislature shall pass no law creating such office, or establishing any general pension system within this State.

This quaint provision has already been obliterated by the Maryland Court of Appeals, which in the case of Mayor & City Council of Baltimore v. Fuget (164 Md. 335 (1933)) found that:

> At the time when ... [Article III, § 59 was submitted to the convention], military pensions were the only pensions to which their minds were thereby directed, the granting of which they apprehended would result in enormous frauds and wrongdoing. Other pensions that had not yet come into existence and to which their minds were necessarily not directed were not, we think, intended to be included within the prohibited class.

Maryland now has a comprehensive Employee Retirement System (Code, Article 73B).

(5) Article IV, § 45

> Coroners, Elisors, and Notaries Public may be appointed for each county, and the city of Baltimore, in the manner, for the purpose, and with the powers now fixed, or which may hereafter be prescribed by Law.

(An Elisor is a person appointed by the court to summons into court, execute a writ, or take charge of the jury when the sheriff or coroner is disqualified to act.)

The absence of similar provisions in modern state constitutions and the Model State Constitution makes it apparent that the functionaries provided for in Article IV, § 45 may be appointed without constitutional authorization, and we do not believe their existence to be of sufficient importance as to call for inclusion in the basic document. There is adequate existing statutory law.

Coroners have been replaced by the Medical Examiners appointed by the Department of Post Mortem Examiners (Code, Article 22). Elisors may be appointed (on an ad hoc basis) by the judges where a sheriff is disqualified to act. (Maryland Rules of Procedure, Rule 117). Notaries Public are provided for under Code, Article 68.

(6) Article VII, § 3

> The State Librarian shall be appointed by the Governor, by and with the advice and consent of the Senate, and shall hold his office during the term of the Governor, by whom he shall have been appointed, and until his successor shall be appointed and qualified. His salary shall be fifteen hundred dollars a year; and he shall perform such duties as are now, or may hereafter be prescribed by Law; and no appropriation shall be made by Law, to pay for any Clerk, or assistant to the Librarian. And it shall be the duty of the Legislature, at its first session after the adoption of this Constitution, to pass a Law regulating the mode and manner in which the books in the Library shall be kept and accounted for by the Librarian, and requiring the Librarian to give a bond, in such penalty as the Legislature may prescribe, for the proper discharge of his duties. The office of the State Librarian shall be abolished as of the end of the term of the present incumbent.

The last sentence of this section (an amendment passed in 1958) has made the entire section self-executing. There is no longer a State Librarian. However, there is a State Library with a Director (and, presumably clerks and assistants paid out of State funds) in accordance with Article 41, § 155 of the Code, et seq. Section 5, ch. 129, Acts 1959 provides that all references to "State Librarian" or to the "Librarian" referring to the "State Library" be changed either to the words "State Library" or "Director" as the context requires. This presumably cures any conflicts with the

prohibitions of the present Constitution. Authorization of the State Library and Librarian (or Director) is now completely statutory, and we recommend that it so remain, omitting any reference to these subjects in the new Constitution.

Respectfully submitted,

COMMITTEE ON MISCELLANEOUS PROVISIONS

January 6, 1966

STATE OF MARYLAND

CONSTITUTIONAL CONVENTION COMMISSION

University of Maryland Library
College Park, Md.

SECOND REPORT

OF THE

COMMITTEE ON MISCELLANEOUS PROVISIONS

March 11, 1966

RE: OATHS OF OFFICE, INSPECTION OF BANK RECORDS, PROPERTY EXEMPTIONS FROM EXECUTIONS, AND LEGISLATIVELY CREATED CORPORATIONS

The Committee on Miscellaneous Provisions recommends the following to the Commission with respect to four provisions of the Maryland Constitution assigned to it:

1. Article I, §6

"SEC. 6. Every person elected, or appointed, to any office of profit or trust, under this Constitution, or under the Laws, made pursuant thereto, shall, before he enters upon the duties of such office, take and subscribe the following oath, or affirmation: I, _____, do swear, (or affirm, as the case may be), that I will support the Constitution of the United States; and that I will be faithful and bear true allegiance to the State of Maryland, and support the Constitution and laws thereof; and that I will, to the best of my skill and judgment, diligently and faithfully, without partiality or prejudice, execute the office of _____, according to the Constitution and Laws of this State (and, if a Governor, Senator, Member of the House of Delegates or Judge), that I will not directly or indirectly, receive the profits or any part of the profits of any other office during the term of my acting as _____."

The Committee recommends that there be an oath in the constitution, and that the present language be retained up through the words "according to the Constitution and Laws of the State." A study of other states' constitutions indicates that practically all of them contain an oath of office for public officers. The remainder of the oath beginning with the words, "(and, if a Governor . . .)" should be deleted completely and the sentence, "No other oath, declaration or political test shall be required" should be added so that the oath section would read:

> "SEC. 6. Every person elected, or appointed, to any office of profit or trust, under this Constitution, or under the Laws, made pursuant thereto, shall, before he enters upon the duties of such office, take and subscribe the following oath, or affirmation: I, _____, do swear, (or affirm, as the case may be), that I will support the Constitution of the United States; and that I will be faithful and bear true allegiance to the State of Maryland, and support the Constitution and Laws thereof; and that I will, to the best of my skill and judgment, diligently and faithfully, without partiality or prejudice, execute the office of _____, according to the Constitution and Laws of this State. No other oath, declaration or political test shall be required."

In recommending the deletion of the provision relating to receiving the profits of any other office, the Committee wishes to make clear its position that the recommendation for deletion of this provision does not constitute a decision to eliminate this prohibition (the substance of which is found in Article 35 of the Declaration of Rights) from the constitution. Rather, the words are deleted here because deemed inappropriate for the oath of office. As recommended, this section would be

substantially similar to that contained in Section 1.07 of the Model State Constitution except that in our section the oath would precede the limitation, rather than following it. The Committee feels that this more accurately conveys the idea that the oath prescribed is mandatory and that no other oath shall be required.

2. Article III, §39

> "SEC. 39. The books, papers and accounts of all banks shall be open to inspection under such regulations as may be prescribed by law."

The Committee recommends that this entire section be eliminated from the constitution. There can be no doubt that the legislature has inherent power to require banks to disclose their books and accounts to state inspection. This matter is presently covered by Articles XI and XXIII of the Code, which articles would in no way be affected by the removal of this section from the constitution.

The Committee has received a letter from Mr. Hospelhorn, Deputy Bank Commissioner, wherein he states that both Commissioner O'Conor and he agree that "the provision contained in Article 3, Section 39, of the present constitution of Maryland is no longer needed" "since the code provisions cover the area." The Committee feels that the subject matter of Article III, Section 39 is not important enough to warrant its retention in the constitution.

3. Article III, §44

> "SEC. 44. Laws shall be passed by the General Assembly to protect from execution a reasonable amount of the property, of the debtor, not exceeding in value, the sum of five hundred dollars."

The Committee recommends that this entire section be eliminated from the constitution principally on the ground that it serves no useful purpose. (See discussion of this section in the Committee's First Report, p. 2.) While the provision is couched in mandatory terms and theoretically requires the legislature to pass some exemption statutes, its principal objective is to put a ceiling on the amount of money that can be exempted by the legislature. The $500 ceiling presently maintained has been in the constitution since 1851. The social utility of the limit can be debated but the Committee feels that the legislature ought not to be restricted by a constitutional ceiling. It should be pointed out that the constitutional limitation applies only to property subject to execution (as opposed to property not subject to execution but subject to attachment such as salaries and intangible personal property, In re Posin, 183 F. Supp. 380 (D. Md. 1962), aff'd, 284 F.2d 300), so that the legislature is free even with Article III, Section 44 to exempt larger amounts from attachment. In this regard the Posin case makes it clear that the legislature has the inherent power to exempt reasonable amounts of property from execution or attachment. The Posin case recognizes, however, that there are limits on the power of the legislature to exempt property from execution. Notwithstanding this, the Committee feels that the limits ought to be set by the legislature rather than by the constitution.

4. Article III, §48

> "SEC. 48. Corporations may be formed under general laws, but shall not be created by Special Act, except for municipal purposes and except in cases where no general laws exist, providing for the creation of corporations of the same general character, as the corporation proposed to be created; and any act of incorporation passed in violation of this section shall be void. All charters granted, or adopted in pursuance of this section, and all charters heretofore granted and created, subject to repeal or modification, may be altered, from time to time, or be repealed; Provided, nothing herein contained shall be construed to extend to Banks, or the incorporation thereof. The General Assembly shall not alter or amend the charter, of any corporation existing at the time of the adoption of this Article, or pass any other general or special law for the benefit of such corporation, except upon the condition that such corporation shall surrender all claim to exemption from taxation or from the repeal or modification of its charter, and that such corporation shall thereafter hold its charter subject to the provisions of this Constitution; and any corporation chartered by this State which shall accept, use, enjoy, or in any wise avail itself of any rights, privileges, or advantages that may hereafter be granted or conferred by any general or special Act, shall be conclusively presumed to have thereby surrendered any exemption from taxation to which it may be entitled under its charter, and shall be thereafter subject to taxation as if no such exemption has been granted by its charter."

The Committee recommends that this entire section be eliminated from the constitution because the prohibition against passing special incorporation acts should be a part of Article III, Section 33 which prohibits in much broader terms the passage of any special laws when the subject matter is covered by existing general laws. If the Commission adopts the Committee's recommendation, the Committee will inform the Committee on the Legislative Department that any redrafting of Article III, Section 33 should

consider the fact that Section 48 has been eliminated so that the subject matter may be included within the terms of that section.

The elimination of section 48 raises an additional problem, however. Under this section the charters of previously established "legislative" corporations (i.e., corporations established by special act of the legislature) are frozen and if any such corporation attempts to avail itself of rights granted under the General Corporation law, such as amending its charter, it would lose its tax exempt status. To eliminate Section 48 would appear to free the existing "legislative" corporations to amend their charters without losing their tax exempt status. This section as it now appears became part of the constitution in 1891 and according to information supplied the Committee by the State Department of Assessments and Taxation the only active private corporations operating under these type charters are the Baltimore and Ohio Railroad and the Greenmount Cemetery. While the elimination of this provision would be of benefit to these two companies, the Committee feels that the advantage of a constitution without special situation references outweighs any slight benefit given them.

Respectfully submitted,

Committee on Miscellaneous Provisions

Agricultural Economics
University of Maryland Library
College Park, Md.

C O N S T I T U T I O N A L C O N V E N T I O N C O M M I S S I O N

THIRD REPORT

OF THE

COMMITTEE ON MISCELLANEOUS PROVISIONS

Maryland Room
University of Maryland Library
College Park, Md

June 20, 1966

RE: ARTICLE XV, SECTION 5

The Committee on Miscellaneous Provisions makes the following recommendation with respect to Article XV, Section 5 of the Maryland Constitution, which provides:

> "In the trial of all criminal cases, the jury shall be the Judges of the Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction."

The Committee recommends that the provision be eliminated. This provision has been the subject of extensive debate and discussion, both in the bar associations and the courts. Maryland and Indiana are the only two states which still have such a provision. Numerous state courts have either stated that the system was unconstitutional, State v. Burpee, 25 A. 964, 974 (Ver., 1892); State v. Wright, 53 Me. 328, 338 (1865); Commonwealth v. Porter, 10 Met. (Mass.) 263, 278-80 (1845); and Commonwealth v. Antheas, 5 Gray (Mass.) 185, 227-36 (1857), or have described such defects in the system as would produce the conclusion that it is unconstitutional. Pleasant v. State, 13 Ark. 360, 372, 373 (1853); State v. Gannon, 52 A. 727, 732-38 (Conn., 1902); State v. Jeandell, 5 Harr. (Del.) 475, 482-84 (1848-1855); Brown v. State, 40 Ga. 689, 695-98 (1870); People v. Bruner,

175 N.E. 400 (Ill. 1931); Montee v. Commonwealth, 3 J.J. Marsh. (Ky.) 132, 149-52 (1830); Hamilton v. People, 29 Mich. 173, 189-93 (1874); Williams v. State, 32 Miss. 389, 396 (1856); Parrish v. State, 14 Neb. 60, 63 (1883); Pierce v. State, 13 N.H. 436, 551-54 (1843); Roesel v. State, 41 A. 408, 417-22 (N.J., 1898); Duffy v. People, 26 N.Y. 588, 591-93 (1863); Pennsylvania v. Bell, Addison 156, 160-61 (1793); State v. Drawdy, 14 Rich. (S.C. 87, 90 (1866); State v. Syphrett, 27 S.C. 29, 32-34 (1887); Harris v. State, 7 Lea (Tenn.) 538, 548-55 (1881); and State v. Dickey, 37 S.E. 695, 699 (W.Va., 1900).

In other states, the rule was never in effect, or was rejected as incorrect or not in accord with the authorities or state statutes. State v. Jones, 5 Ala. 666, 672-73 (1843); Pierson v. State, 12 Ala. 153-55 (1847); People v. Anderson, 44 Cal. 65, 70 (1872); Dill v. People, 29 P.2d 1035 (Colo., 1933); Johnson v. State, 9 So. 208, 212 (Fla., 1891); Terr v. Alcantara, 24 Haw. 197, 208-09 (1918); Terr v. Kaeha, 24 Haw. 467, 471 (1918); People v. Barnes, 9 P. 532 (Ida., 1886); State v. Anthoman, 274 P. 805 (Ida., 1929); State v. Miller, 4 N.W. 900, 901-02 (Iowa, 1880); State v. Truskett, 118 P. 1047 (Kan., 1911); State v. Ford, 37 La. Ann. 443, 465 (1885); State v. Taunt, 16 Minn. 109 (1870); State v. Rheams, 24 N.W. 302 (Minn., 1885); Hardy v. State, 7 Mo. 607, 609 (1842); State v. Koch, 85 P. 272 (Mont., 1906); State v. Waterman, 1 Nev. 543 (1865); Terr v. Kee, 25 P. 924 (N.M., 1891); Terr v. West, 99 P. 343 (N.M., 1908); State v. Peace, 46 N.C. 251, 257-64 (1854); Dakota v. O'Hare, 44 N.W. 1003 (N.D., 1890); State v. Barry, 92 N.W. 809 (N.D., 1902);

State v. Tolley, 136 N.W. 784 (N.D., 1912); Montgomery v. State, 11 Ohio 424, 427-28 (1842); Commonwealth v. McManus, 21 A. 1018, 22 A. 761 (Pa., 1891); Commonwealth v. Bryson, 120 A. 552 (Pa., 1923); Commonwealth v. Castellana, 121 A. 50 (Pa., 1923); State v. Smith, 6 R.I. 33, 34 (1859); Terr v. Stone, 4 N.W. 697 (S.D., 1880); State v. Boughner, 59 N.W. 736 (S.D., 1894); Nels v. State, 2 Tex. 280 (1847); State v. Anselmo, 148 P. 1071 (Utah, 1915); Dejarnette v. Commonwealth, 75 Va. 867 (1881); Hartigan v. Terr, 1 Wash. T 447 (1874); Stockman v. State, 293 N.W. 923 (Wisc., 1940); and Gardner v. State, 196 P. 750 (Wyo., 1921). See also Okla. Stat. Ann. § 22-832 and § 22-834; Ore. Comp. L. Anno. § 26-928.

In Duffy v. People, 26 N.Y. 588, 591 (1863), the court said: "The selection of jurors from all classes of the people whose education and business cannot, as a general rule, have qualified them to decide legal questions, renders it unreasonable as well as apparently unsafe to require them to pass upon such questions." Even in Maryland and Indiana the courts have called the rule "anachronistic," Slansky v. State, 192 Md. 94, 107 (1949); and "archaic," Beavers v. State, 141 N.E.2d 118, 121 (Ind., 1958). The Supreme Court of the United States, however, has, in dismissing an appeal questioning the constitutionality of this provision, in effect, held that the Maryland provision does not violate the federal Constitution. Giles v. Maryland, 229 Md. 370, appeal dismissed, 372 U.S. 767. Its constitutionality under the federal Constitution continues to be challenged. See Wyley v. Warden, Maryland Penitentiary, (D. Md. Thomsen, C.J., decided May 18, 1966).

In 1955 Judge Stedman Prescott, who is now Chief Judge on the Maryland Court of Appeals, in his address to the Maryland State Bar Association, summarized his position as follows:

> "I am opposed to it because it violates the fundamental concept of trial by jury; it has been discarded and repudiated in nearly every jurisdiction where tried; it has retarded the growth of our substantive criminal law; such outstanding leaders . . . as Justice Story, Lord Mansfield, Charles Evans Hughes, Judges Chesnut, Markell and Dennis, Charles McHenry Howard and scores of others have spoken or written against it; juries are not trained by experience nor training to interpret the law; of manifold other reasons why such an anomolous situation should not be permitted to remain as a blight upon the administration of justice in Maryland. In my humble judgment it is archaic, outmoded and atrocious."

In 1962 a debate was held by the Maryland State Bar Association on whether or not this provision should be retained in the Maryland Constitution. See 67 Maryland State Bar Association Report, page 101 et seq. Judge Prescott and Judge Proctor spoke on behalf of those desiring that the provision be removed. Mr. Benjamin B. Rosenstock and Judge O'Donnell argued that the provision should be retained, basically on the theory that juries are more objective than judges, have more common sense than judges and in a case where the law ought not to be applied, could fail to apply it. Additionally Judge Brune, former Chief Judge of the Maryland Court of Appeals, urged the Bar Association to come out in favor of removing this provision, pointing out that the effect of the provision is to allow the jury to determine if a particular conviction is desirable and if so to convict and if not, not to convict regardless of what the law might be. The Bar Association recommended that the provision be repealed.

In light of the overwhelming evidence against it, and in light of the Committee's position that judges are more qualified to interpret and apply the law than juries, the Committee recommends that it be eliminated.

Respectfully submitted,

Committee on Miscellaneous Provisions

Maryland Room
University of Maryland Library
College Park, Md.

CONSTITUTIONAL CONVENTION COMMISSION

FOURTH REPORT

OF THE

COMMITTEE ON MISCELLANEOUS PROVISIONS

University of Maryland Library
College Park, Md

July 6, 1966

RE: EDUCATION AND MILITIA PROVISIONS

The Committee on Miscellaneous Provisions reports that it has concluded its review of the above referred to provisions and makes the following recommendations:

I. THE EDUCATION PROVISIONS

A. Introduction.

The provisions with respect to education in the present Constitution are contained in Article VIII which provides:

> Section 1. The General Assembly, at its First Session after the adoption of this Constitution, shall by Law establish throughout the State a thorough and efficient System of Free Public Schools; and shall provide by taxation, or otherwise, for their maintenance.
>
> Section 2. The System of Public Schools, as now constituted, shall remain in force until the end of the said First Session of the General Assembly, and shall then expire; except so far as adopted, or continued by the General Assembly.
>
> Section 3. The School Fund of the State shall be kept inviolate, and appropriated only to the purposes of Education.

and in Article 43 of the Declaration of Rights which provides:

> That the Legislature ought to encourage the diffusion of knowledge and virtue, the extension

of a judicious system of general education, the promotion of literature, the arts, sciences, agriculture, commerce and manufactures, and the general melioration of the condition of the People. The Legislature may provide that land actively devoted to farm or agricultural use shall be assessed on the basis of such use and shall not be assessed as if sub-divided.

Additional budgetary provisions with respect to the public schools are contained in Article III, Section 52, subsections 4, 6, 11 and 12 which provisions are being considered by the Committee on State Finance and Taxation. The views of this Committee with respect to these subsections have been given to that committee.

The Committee on Miscellaneous Provisions recommends that there be in the new constitution separate provisions with respect to public education designed, among other things, to emphasize the importance of education and the public school system. (The Committee, however, makes no recommendation as to whether these provisions should be in a separate article. This the Committee leaves to the Committee on Style.) The Committee recommends that Article VIII and Article 43 be eliminated and in their place there be the following:

Section 1. The General Assembly shall provide for a state-wide system of free public schools sufficient for the education of, and open to, all children of school age; and shall also provide for such other public educational institutions as may be desirable for the intellectual, cultural and occupational development of the citizens of this State.

Section 2. The General Assembly shall provide for and maintain a system of higher education dedicated to excellence.

Section 3. The University of Maryland shall be the state university and shall be governed by the Board of Regents which shall have general supervision of the institution and the control and direction of all expenditures from the institution's funds. The Board shall consist of 11 members or such greater number as provided by law who shall be appointed by the governor [by and with the advice and consent of the Senate] for a term of 7 years.*

*Section 4. The state school systems shall be supported and maintained without discrimination as to [religion, creed, race or national origin].***

B. Consideration of Matters Not Contained in the Proposed Provisions.

In its deliberations the Committee considered and rejected a number of matters which are not contained either in the present Constitution or in the suggested language, and these matters will be discussed initially.

On March 10, 1966, the Committee held a public hearing for the purpose of obtaining the viewpoints of leaders in the field of education with respect to possible changes in the education provisions of the Maryland Constitution. Some of those who spoke were:

* The bracketed language should be included only if the Committee on the Legislative Department and the Committee on the Executive Department decide that in other areas this type of provision will be included.

**The bracketed language should be consistent with language contained in the Declaration of Rights.

Dr. Thomas G. Pullen, Jr., Dr. Lawrence G. Paquin, Dr. Alvin Kuhn, Dr. David Zimmerman, Mr. William S. Sartorius and Dr. Harry Bard. The principal suggestions made by one or more of these persons were:

(a) That the present protection contained in Section 3 of Article VIII relating to the "School Fund" be retained;

(b) That the budgetary provisions in Article III, Section 52 be retained;

(c) That the University of Maryland and its Board of Regents be given constitutional recognition and autonomy; and

(d) That the State Board of Education and the State Superintendent of the public schools be given constitutional recognition.

The Committee then invited Dr. Wilson Elkins to its meeting of June 7, 1966, to discuss with the Committee the advisability of giving constitutional recognition and autonomy to the University of Maryland.

The Committee considered each of the above suggestions, as well as the suggestion that other public institutions of higher education besides the University of Maryland be given constitutional sanction, and also considered including a statement which would explicitly sanction the Maryland practice of giving aid to private institutions of higher education.

Members of the Committee then prepared drafts which included or excluded various items and after considerable discussion the Committee made the following decisions:

1. That Section 3 of Article VIII providing for the inviolability of the "School Fund" was to be eliminated.

The Committee recognized that many of the educators at the Committee's hearing urged that this provision be retained. However, the Committee, after checking with the Attorney General's office and with public school officials familiar with the budget, came to the conclusion that no separate or identifiable "School Fund" now exists, nor is one likely to come into existence in the future and, therefore, the provision does not actually provide any real protection to the integrity of the money appropriated for public school purposes. It was found that funds to run the public school system were protected from possible diversion or elimination by virtue of subsections 4, 6, 11, and 12 of Article III, Section 52. For these reasons, the Committee eliminated Section 3 of Article VIII.

2. That the Committee recommend to the Finance Committee that the substance of Article III, Section 52 relating to public school funds, which provides in effect that the school budget as it appears in the Governors' executive budget cannot be altered, be retained. Such a recommendation has been made.

3. That the University of Maryland and its Board of Regents be given constitutional recognition and autonomy, but that no other public institution of higher education be so recognized. (See discussion, infra.)

4. That the State Board of Education and the office of State Superintendent of the Public Schools not be given constitutional recognition.

One of the principal reasons for failing to include any mention of the State Superintendent or the State Department of Education in the suggested language was a reluctance to

change the status quo of what appears to the Committee to be an extremely well run organization free from political influence. The reason which was put forth for giving constitutional recognition to the State Superintendent and the State Board of Education was to insure against future political abuse of these positions. But the Committee felt that constitutional sanction did not necessarily give greater protection against political interference. As an example, the Committee refers to the recently adopted Hawaiian Constitution which provided for the appointment of a State Superintendent of Schools. However, that Constitution has even more recently been amended to provide that the State School Superintendent is now elected; a result which this Committee felt would be unfortunate in Maryland. Also, with respect to the State Superintendent, since the Commission generally is attempting to create as few constitutional offices as possible, the Committee felt that the balance strongly favored exclusion.

5. That no explicit reference be made to the long-established Maryland practice of aiding private educational institutions (usually at the college level).

(The Committee is cognizant of the recent case in the Court of Appeals of Maryland holding that the use of public funds for sectarian colleges was prohibited by the 1st and 14th Amendments to the United States Constitution but not by the Maryland Constitution. (Horace Mann v. Bd. of Public Works, Md. (Decided June 2, 1966). While this matter will be appealed to the Supreme Court of the United States, the

pendency of this case did not directly affect the Committee's position.)

The Committee was unanimously agreed that it did not want to include language which would either prohibit or require public aid to private educational institutions. The Committee felt that this was a matter to be properly decided by the Legislature as it saw fit, within the constitutionally prescribed limits.

In light of the long-established practice of the General Assembly (which began as early as 1784 and which has continued up to the present) to give aid to private institutions of all kinds which are performing a public function (such as colleges, hospitals, and welfare institutions) and in view of the fact that the Committee did not think that this was on its face an improper use of public funds, the Committee felt that it did not want to prohibit such use. However, since there has been no explicit constitutional sanction for this practice up to this time, and since the Committee also felt that this practice should be in accord with the wishes of the General Assembly, it did not include any language which would require such use.

The Committee, therefore, wishes to make it perfectly clear that nothing either contained in or omitted from the recommended language is intended to prohibit the use of public funds at private educational facilities. It is the Committee's recommendation that the education provisions speak only to the public educational system.

C. Considerations with Respect to the Proposed Provisions.

Section 1. The General Assembly shall provide for a state-wide system of free public schools sufficient for the education of, and open to, all children of school age; and shall also provide for such other public educational institutions as may be desirable for the intellectual, cultural and occupational development of the citizens of this State.

The Committee unanimously agreed that the General Assembly ought to be required to provide for free public schools at the elementary and secondary level. The Committee did not feel that the State should be required at this time to provide free higher education to all Maryland citizens who were qualified and who desired to attend. (A suggestion that this be done was made by Dr. Pullen at the March 10 hearing.) The Committee also felt that a flexible provision recognizing the existence and importance of other public educational institutions should be included.

Section 2. The General Assembly shall provide for and maintain a system of higher education dedicated to excellence.

A separate section on higher education was deemed desirable both from the standpoint of emphasis as well as from the standpoint of the structure of the provisions.

Section 3. The University of Maryland shall be the state university and shall be governed by the

Board of Regents which shall have general supervision of the institution and the control and direction of all expenditures from the institution's funds. The Board shall consist of 11 members or such greater number as provided by law who shall be appointed by the governor [by and with the advice and consent of the Senate] for a term of 7 years.*

The Committee considered whether or not to give specific constitutional recognition and protection to any particular educational institution. After much debate, the Committee unanimously decided to recommend that the University of Maryland be given such recognition and protection as the state university, and that no other institution be so recognized. The principal reason for this decision was the desire of the Committee to protect the autonomy of Maryland's only major public university.

As Dr. Elkins explained, the starting point for any great state university is autonomy of management consistent with, and properly balanced against, the need for supervision by public authorities. The University of Maryland was given statutory autonomy by the Autonomy Act of 1952. While this provides the necessary autonomy, since it is statutory it can

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*The bracketed language should be included only if the Committee on the Legislative Department and the Committee on the Executive Department decide that in other areas this type of provision will be included.

be eroded by subsequent legislation which on at least one occasion has reduced the actual autonomy of the institution. Dr. Elkins also referred to what in his opinion were the three best state universities--the University of California, the University of Michigan and the University of Minnesota--which all have constitutional autonomy of management. As Dr. Elkins emphasized, many state constitutions have provisions recognizing the autonomy of the state university including the recently enacted constitutions in Alaska and Georgia. (See also the Connecticut Constitution adopted in 1965 (Article 8), the Michigan Constitution which went into effect in 1964 (Article VIII), and the Missouri Constitution which went into effect in 1945 (Article IX)).

The Committee believes that because most of the other public institutions are too small to operate as autonomously as the University of Maryland, and because the inclusion of any other institutions would necessitate specific reference being given to each of them, which the Committee thought undesirable, the Committee declined to make specific reference to any other public educational institutions in its recommended provisions. The Committee feels that this will encourage the growth of a unified system of public higher education.

*Section 4. The state school systems shall be supported and maintained without discrimination as to [religion, creed, race or national origin.]**

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* The bracketed language should be consistent with language contained in the Declaration of Rights.

The Committee recognizes that Section 4 merely states what the federal constitution already requires. However, in an effort to emphasize the importance of non-discrimination in education, and to explicitly make it a part of Maryland law, this provision has been included.

II. THE MILITIA PROVISIONS

The provisions with respect to the militia in the present constitution are contained in Article IX which provides:

> Section 1. The General Assembly shall make, from time to time, such provisions for organizing, equipping and disciplining the Militia, as the exigency may require, and pass such Laws to promote Volunteer Militia organizations as may afford them effectual encouragement.
>
> Section 2. There shall be an Adjutant General, appointed by the Governor, by and with the advice and consent of the Senate. He shall hold his office until the appointment and qualification of his successor, or until removed in pursuance of the sentence of a Court Martial. He shall perform such duties, and receive such compensation, or emoluments, as are now, or may be prescribed by Law. He shall discharge the duties of his office at the seat of Government, unless absent, under orders, on duty; and no other officer of the General Staff of the Militia shall receive salary or pay, except when on service, and mustered in with troops.
>
> Section 3. Vacant.

and in Articles 28-32 of the Declaration of Rights which provide:

> Art. 28. That a well regulated Militia is the proper and natural defense of a free Government.
>
> Art. 29. That Standing Armies are dangerous to liberty, and ought not to be raised, or kept up, without the consent of the Legislature.

Art. 30. That in all cases, and at all times, the military ought to be under strict subordination to, and control of, the civil power.

Art. 31. That no soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, except in the manner prescribed by Law.

Art. 32 That no person except regular soldiers, marines, and mariners in the service of this State, or militia, when in actual service, ought, in any case, to be subject to, or punishable by Marital Law.

The Committee also considered Section 8 of Article II, which places ultimate control of the militia in the hands of the governor, and specifies the occasions when the militia may be called out; as well as Section 10 relating to the appointment of military officers, and Section 15 relating to the discipline of military personnel.

The Committee recommends that the present provisions of Article IX of the Constitution, Articles 28 through 32 of the Declaration of Rights, and Sections 10 and 15 of Article II of the Constitution be eliminated* and the following language be used in lieu thereof:

" *The General Assembly may provide for a militia. The governor shall be its commander-in-chief, and shall appoint its officers. The governor may call out the militia to repell invasions, surpress insurrections, and enforce the execution of the laws. The military power of the State shall be and remain*

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* The Committee understands and is assuming that the Declaration of Rights Committee intends to eliminate Articles 28-32 from the new constitution's Declaration of Rights.

subject to civil control at all times, and only persons in active military service shall be subject to trial by a military court.

The Committee further recommends that the militia provisions be included in the general government article and not given a separate article as is presently done.

The Committee held a public meeting on April 11, 1966 and invited General Gelston, Adjutant General of the Maryland National Guard, General Milton A. Reckord, former Adjutant General of the Maryland National Guard, and General William U. Ogletree, Assistant Adjutant General of the Maryland National Guard to express their views. While General Reckord, speaking for all three, was satisfied with the present provisions except the last clause of section 2 regarding the limitation on payment of General Staff officers, his comments indicated that there would be no conflict between the proposed new constitutional provision and the militia's everyday operations which are based on Article 65 of the Maryland Code.

A review of the militia provisions of 49 state constitutions by Mrs. Freedlander indicates that almost all provide that the military shall be subservient to civil power; and all provide that the governor shall be the commander-in-chief and that the legislature is to provide for its organization and maintenance. These three elements plus the explicit power given the governor to call out the militia and appoint its officers are the elements contained in the Committee's recommendation derived from Article IX and similar constitutional provisions in other states.

The Committee, in reviewing Article 32, was uncertain as to the meaning and scope of the term "Marital Law" as used therein. Specifically, the Committee was unsure as to whether the term prohibited the trial of civilians by military courts or prohibited the imposition of military rule on the civilian populace. A comprehensive and thoughtful memorandum was prepared by Mr. Albert Snyder, a student at the University of Maryland Law School, which clearly establishes that the original purpose of Article 32, which has not been altered, was to assure that a civilian would be tried only in a civil (as opposed to military) court; and that military rule over a civilian community in time of domestic disorder (popularly termed "martial law") was not proscribed by that article. It is the Committee's understanding then that the law of Maryland now prevents the trial of any person except a soldier, marine or mariner in actual service, by a military court, and does not prevent the governor from imposing military rule if necessary to enforce the laws or to quiet disorder.

The Committee was of the opinion that the prohibition against the trial of civilians in military courts ought to be retained and that there be included in the new constitution the substance of the provisions now contained in section 8 of Article II describing the occasions for calling out the militia. While this language gives the governor broad powers to call the militia, it should be recognized that any abuse of the power to invoke military rule may be attacked in the courts as a violation of due process of law under the

Fourteenth Amendment to the federal Constitution as well as a violation of a similar provision which is to be contained in the new state constitution. As Mr. Snyder points out, 'While the governor may impose military rule in accordance with his statutory duties, there are considerations of constitutional limitation which must be considered, particularly the Fourteenth Amendment's Due Process Clause."

Respectfully submitted,

Committee on Miscellaneous Provisions

University of Maryland
College Park, Md.

STATE OF MARYLAND

C O N S T I T U T I O N A L C O N V E N T I O N C O M M I S S I O N

FIFTH REPORT

OF THE

COMMITTEE ON MISCELLANEOUS PROVISIONS

October 14, 1966

RE: EDUCATION

I. INTRODUCTION

The Fourth Report of the Committee on Miscellaneous Provisions prepared for the July meeting of the Commission contained a proposed education provision. The Commission, at the close of its July meeting in Easton, discussed briefly the proposed provisions and members of the Commission indicated certain areas of disagreement. The Committee agreed to reconsider its position and file an additional report. After a considerable amount of discussion and review, the Committee has decided to modify its proposed provisions in several respects. Rather than attempt to correlate its initial report with this, the Committee decided to rewrite the education section of its Fourth Report. Therefore, disregard the education section of the Committee's Fourth Report.

II. THE EXISTING EDUCATION PROVISIONS

The provisions with respect to education in the present Constitution are contained in Article VIII, which provides:

> Section 1. The General Assembly, at its First Session after the adoption of this Constitution, shall by Law establish throughout the State a thorough and efficient System of Free Public Schools; and shall provide by taxation, or otherwise, for their maintenance.
>
> Section 2. The System of Public Schools, as now constituted, shall remain in force until the end of the said First Session of the General Assembly, and shall then expire; except so far as adopted, or continued by the General Assembly.
>
> Section 3. The School Fund of the State shall be kept inviolate, and appropriated only to the purposes of Education.

and in Article 43 of the Declaration of Rights, which provides:

> That the Legislature ought to encourage the diffusion of knowledge and virtue, the extension of a judicious system of general education, the promotion of literature, the arts, sciences, agriculture, commerce and manufactures, and the general melioration of the condition of the People. The Legislature may provide that land actively devoted to farm or agricultural use shall be assessed on the basis of such use and shall not be assessed as if sub-divided.

Additional budgetary provisions with respect to the public schools are contained in Article III, Section 52, subsections 4, 6, 11 and 12, which provisions are being considered by the Committee on State Finance and Taxation. These subsections provide, in effect, that the school budget as it is presented to the governor cannot be altered either by the governor or the legislature. The view of this Committee, that the substance of these subsections as they relate to education be retained, has been given to that Committee.

III. PROPOSED NEW PROVISIONS

The Committee on Miscellaneous Provisions recommends that there be in the new constitution separate provisions with respect to

public education designed, among other things, to emphasize the importance of education and the public school system. (The Committee, however, makes no recommendation as to whether these provisions should be in a separate article. This the Committee leaves to the Committee on Style.) The Committee recommends that Article VIII and Article 43 be eliminated and in their place there be the following:

Section 1. The State shall encourage the advancement of knowledge; wherefore, the General Assembly shall appropriate funds for a system of public education at all levels as it deems desirable, to foster, enhance and promote the intellectual, cultural and occupational development of the people.

Section 2. The General Assembly shall provide for a statewide system of free public schools sufficient for the education of, and open to, all children of school age.

Section 3. The University of Maryland shall be managed by the regents of the University of Maryland in accordance with law, and the regents shall have exclusive general supervision of the institution and the control and direction of all expenditures from the institution's funds.

IV. BACKGROUND AND THE PROBLEMS RAISED

In considering revision of the education provisions, the Committee consulted and corresponded with leading educators through-

out the State. At a public hearing on March 10, 1966, among others, the Committee heard from Dr. Thomas G. Pullen, former superintendent of public instruction in Maryland, Dr. Lawrence G. Paquin, Baltimore City School Superintendent, Dr. Alvin Kuhn, Vice President of the Baltimore Campus of the University of Maryland, Dr. David W. Zimmerman of the State Department of Education, Mr. William S. Sartorius, Baltimore County School Superintendent, and Dr. Harry Bard, President of the Baltimore Junior College. Dr. Wilson Elkins met with the Committee on June 7, 1966, and has corresponded extensively with the Committee regarding statutory autonomy for the University. The Committee has also met with Mr. Comer Coppie, Executive Director to the Board of State Colleges, Mr. Michael Grossman, assistant to Mr. Coppie, and Mathias J. DeVito, Esq., a member of the Board of State Colleges, with reference to proposed autonomy for the Board of State Colleges. The Board presented us with a thorough and comprehensive paper in support of its views. Additionally, the Committee heard from Commission members Dr. Harry Bard and Dr. Martin D. Jenkins. Representing the community colleges, Dr. Bard urged that the community colleges be granted recognition in the constitution, but feels that autonomy would be inappropriate. Dr. Jenkins, President of Morgan State College, suggested that autonomy be granted to "other state institutions of higher education offering work of baccalaureate level . . . ."

A summary of the various issues and proposals considered by the Committee is as follows:

A. That the present protection contained in Section 3 of Article VIII relating to the school fund be retained.

B. That the State Board of Education and the state superintendent of the public schools be given constitutional recognition.

C. That the University of Maryland and its Board of Regents be given constitutional recognition and autonomy.*

D. That the State Board of Colleges be granted constitutional autonomy and/or that the governing boards of all four-year institutions of higher learning be granted autonomy.

E. That the community colleges be granted constitutional recognition, but not autonomy.

F. That state higher educational facilities be open to all qualified residents regardless of their ability to pay.

G. That express constitutional sanction be given the Maryland practice of granting aid to private institutions of higher education.

V. RESOLUTION OF THE ISSUES

The Committee has taken the following positions:

A. That Section 3 of Article VIII, which provides that the "School Fund . . . be kept inviolate and appropriated only to the purposes of Education," be eliminated.

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* The meaning of the popular term "autonomy" is explained infra.

Education was first given constitutional recognition in the Constitution of 1864, Article VIII. Section 6 of that Article provided for the creation of "a fund for the support of the free public schools of the State by the imposition of an annual tax . . . , the proceeds of which tax shall be known as the public-school fund . . . ." The section then provided that the "fund . . . shall remain forever inviolate as the free public school fund of the State, and the annual interest of said school-fund shall be disbursed for educational purposes only . . . ." This provision became Article VIII, Section 3 of the 1867 Constitution. Subsequently, special state school taxes were abandoned, and since 1923 no separately identifiable state tax-raised fund has existed -- state funds for school purposes now come from general funds. Funds appropriated for school purposes but not used remain general funds of the State and are not "earmarked" for educational purposes. General funds once appropriated cannot be used for a purpose other than that for which the appropriation is made, but revert to the general fund if unused. Article VIII, Section 3 is therefore today of no real significance when related to state funds.

Alfred S. Niles at p. 309 of his text, Maryland Constitutional Law, explains that the "school fund" as interpreted by the Court of Appeals means any fund devoted by state authorities for the use of the schools and includes whatever money may be received by the local school authorities from their localities. These funds, including local school taxes, can only be appropriated for purposes of education and an appropriation by a local school board may be challenged as not being for educational purposes. To this extent, the provision

has application today. See Board of Education v. Wheat, 174 Md. 314, where the Court of Appeals held that providing bus transportation for private school children did not violate Article VIII, Section 3. See also Clauss v. Board of Education, 181 Md. 513.

In light of the facts that the proposed constitution will require each county to assume home rule, and that "school funds" to the extent they now exist are essentially local funds, the Committee believes it proper to exclude Section 3 from the new constitution with the recommendation that its intent be carried forward in the local charters. In any event, the real protection to the integrity of public school funds is contained in the provisisons of Section 52 of Article III. (See p. 2 supra.)

B. That the State Board of Education and the office of state superintendent of the public schools not be given constitutional recognition.

One of the principal reasons for failing to include any mention of the state superintendent or the State Department of Education in the suggested language was a reluctance to change the status quo of what appears to the Committee to be an extremely well run organization, free from political influence. The reason which was put forth for giving constitutional recognition to the state superintendent and the State Board of Education was to insure against future political abuse of these positions. The Committee feels that constitutional sanction does not necessarily give greater protection against political interference. For example, the Committee refers to the recently adopted Hawaiian Constitution which provides for the appointment of a state superintendent of schools. However, that

Constitution even more recently has been amended to provide that the state school superintendent be elected, a result which this Committee feels would be unfortunate in Maryland. Also, with respect to the state superintendent, since the Commission generally is attempting to create as few constitutional offices as possible, the Committee feels that the balance strongly favors exclusion of this office from the constitution.

C. That the regents of the University of Maryland be given the power of management and control (commonly referred to as "autonomy" of the University.

In 1952 the General Assembly passed an act which provided in effect that the Board of Regents shall have the power to manage the affairs of the University of Maryland with certain exceptions. This act, known as the "Autonomy Act," has been codified as Sec. 249(e) of Article 77, Annotated Code of Maryland (1957 ed.). The Committee's recommendation proposes to give the regents constitutional sanction for their power of management of the University within reasonable limits as provided by law.

The University of Maryland has been in existence in some form since 1807. It was incorporated by Chapter 159 of the Acts of 1812, with the governing authority being the regents of the University of Maryland. See also Chapter 480 of the Laws of Maryland (1920). It is a land-grant institution; it has been a comprehensive institution since 1921; and today stands as the State's only university, and one of the ten largest in the nation. As Dr. Elkins noted in a recent letter to the Committee:

The University has had a degree of statutory autonomy since 1952. Under this statutory autonomy, it has grown in quantity to one of the ten largest universities in the United States and, at the same time, the quality has been improved. It enjoys full accreditation by its regional accrediting association and numerous professional associations. It has been invited to establish a Chapter of Phi Beta Kappa, which is recognition for excellence in the arts and sciences. The faculty has attained distinction in many fields and, owing to their stature, the University is engaged in a very substantial research program sponsored, in the main, by the federal government. The amount of sponsored research and training grants has increased from $1,279,133 in 1953-54 to $15,189,449 in 1965-66. These and many other illustrations which could be cited provide evidence of the progress of the University under statutory autonomy.

The function of the University is general, and it is also unique in some respects. It offers professional, pre-professional as well as general education. Only the University offers the highest academic degree, the doctorate. Furthermore, the University is the principal research agency of the state, and this important area, which is an integral part of the graduate program, is growing rapidly. As a research agency, it derives funds from several sources, with the federal source rapidly becoming the most important. This multi-million dollar research activity could not function at even a satisfactory level without a degree of autonomy.

With its comprehensive teaching program, its vast research activity, its dependence upon state, federal and special funds for support, the governing board has to be in a position to make policies and oversee the administration of them. I am confident that if the Act of 1952, often called the Autonomy Act, had not been passed, the University would have suffered seriously. It has enabled the Board of Regents to exercise power of management and thereby develop and compete in the educational field.

Constitutional recognition will further enhance the reputation of the University and provide security for the future. In asking for this, the University does not seek independence from the legislature or the executive branch of the government, but it does plead for the power of internal management. It does not seek to be independent of the Budget Bureau of

> the state in justifying funds from the state, but it should be independent of the Budget Bureau in the management of those funds. If the University did not have the power to purchase equipment and employ personnel without going through other agencies, it would not be in a position to carry on its vast and highly specialized research and service activities.
>
> In summary, the University of Maryland presents a special case for constitutional recognition. Its comprehensive nature, complexity, size, unique function, and its experience with statutory autonomy places it in a position which is strikingly different from all other institutions in the state. Statutory "autonomy" can be eroded and has been in the past. In many and often devious ways, it is under attack continually. A simple provision in the constitution, giving power of management to the Board of Regents, will substantially strengthen the University of Maryland in the decisive years ahead.

While all of the nation's leading universities do not enjoy constitutional autonomy, those which do -- i.e., the University of California, the University of Michigan and the University of Minnesota -- are included in the top ranks. At least half of the states recognize the state university in their constitutions and there appears to be a trend toward the granting or expansion of constitutional autonomy in new or revised state constitutions. See constitutions of Alaska (Article VII, Sections 2 and 3), Hawaii (Article IX, Sections 4 and 5 as amended), Georgia (Article XIII, Section 4), Michigan (Article XIII), and Missouri (Article IX). See also Popular Government, May 1966, pp. 9-16, article by Robert E. Phay entitled "The Board of Trustees of the University of North Carolina: A Comparison With Other Governing Boards."

Autonomy of management in higher education is not a recent development. Michigan first wrote it into its constitution in 1850. Indeed, it may be said that the early land-grant colleges, of which

the University of Maryland is one, have been traditionally autonomous, while the vast expansion of state government, with its accompanying bureaucratic centralization, has become a discordant latter-day intrusion upon the desired and established independence of institutions which have grown up and flourished in competition with the independent private university. See Malcolm Moos and Francis E. Rourke, The Campus and the State (Johns Hopkins Press, 1959), p. 47 et seq.

In 1928 the Supreme Court of Minnesota stated in State v. Chase, 175 Minn. 259, 220 N.W. 951:

> The purpose of the Constitution remains clear. It was to put the management of the greatest state educational institution beyond the dangers of vacillating policy, ill-informed or careless meddling and partisan ambition that would be possible in the case of management by either Legislature or executive, chosen at frequent intervals and for functions and because of qualities and activities vastly different from those which qualify for the management of an institution of higher education.

As noted in The Report of the Commission for the Expansion of Public Higher Education in Maryland (Curlett Commission Report), June 1962, at p. 45:

> . . . Thomas Jefferson long ago pointed out, the University is the capstone of public education in every state -- an institution of learning of the highest grade. The primacy of the state university has since been acknowledged in every system of public higher education established in the United States. In some parts of the country the preeminence of the University has led to its being placed in a position of constitutional independence within the total structure of state government.

Many other state universities enjoy statutory autonomy, but the experience there, and here, has shown statutory protection to be inadequate. In 1964 the General Assembly amended the Autonomy Act

to require that purchases made by branch facilities of the University be "subject to the authority of the Central Purchasing Bureau." In the absence of constitutional protection, it is safe to assume that similar inroads into the University's autonomy will be made or threatened.

D. That no other institution or governing board be given constitutional autonomy or recognition.

In making this recommendation, the Committee wishes to make clear that its position is not intended in any way to reflect upon the quality of other state institutions of higher learning or their governing boards, or to indicate an intention to exclude them from potential control of their respective institutions. On the contrary, the Committee is highly impressed by the rapid development in quantity and quality of the State's other higher educational facilities, and is concerned that they be afforded maximum opportunity for unfettered development. The Committee does not, however, feel that constitutional autonomy or recognition is desirable for institutions other than the University at this time. Some of the Committee's reasons for this finding are as follows:

1. Higher education in Maryland only recently evolved into a "tripartite" structure consisting of the University of Maryland, the state colleges, and the community colleges. The state colleges, with the exception of Morgan State College which is contemplated for inclusion, are now under the direction of the Board of State Colleges; while the community colleges are under the State School Board. The consolidation of the state colleges on the recommendation of the

Curlett Commission is less than four years old. While it is likely that this arrangement will prove permanent, the Committee feels that it would be premature to stratify in the constitution a system of government for the colleges which is still in a state of emerging development.

2. The Committee does not feel that the autonomy of the colleges should originate in the constitution. The Board of State Colleges has had no experience with autonomy, and admittedly is not in a present position to handle all purchasing, or to operate independently of other state agencies.

3. The Committee finds that the need for autonomy for other institutions is less urgent and compelling than in the case of the state university. As noted by Malcolm Moos and Francis E. Rourke in The Campus and the State (Johns Hopkins Press, 1959), at p. 193, the functions and purposes of the state university differ from those of the colleges. Colleges do not need the flexibility demanded by a multifaceted university. The university is practically a government in itself, operating a program or network of programs in research and instruction too complex for the State to try to regulate in detail, while the colleges primarily concentrate on classroom instruction which may more readily be overseen and regulated without undue interference from the outside. It is to be noted that a large proportion of the University of Maryland's funds, particularly those applied in the non-classroom areas, are derived from the federal government and other sources outside the State. The colleges are almost wholly supported by state appropriations and student fees.

E. That no explicit reference be made to the long-established Maryland practice of aiding private educational institutions (usually at the college level).

(The Committee is cognizant of the recent case in the Court of Appeals of Maryland holding that the use of public funds for sectarian colleges was prohibited by the 1st and 14th Amendments to the United States Constitution, but not by the Maryland Constitution Horace Mann v. Bd. of Public Works, 242 Md. 645 (decided June 2, 1966). While this matter is being appealed to the Supreme Court of the United States, the pendency of this case did not directly affect the Committee's position.)

The Committee is unanimous in not recommending the inclusion of language which would either prohibit or require public aid to private educational institutions. The Committee feels that this is a matter to be decided by the legislature as it sees fit, within the constitutionally prescribed limits.

In light of the long-established practice of the General Assembly (which began as early as 1784 and which has continued up to the present) to give aid to private institutions of all kinds which are performing a public function (such as colleges, hospitals, and welfare institutions) and in view of the fact that the Committee does not think that this is on its face an improper use of public funds, the Committee does not want to recommend the prohibition of such donations. However, since there has been no explicit constitutional sanction for this practice up to this time, and since the Committee also feels that this practice should be in accord with the wishes of the legislature, it is not recommending inclusion of any language which would require such donations.

The Committee, therefore, wishes to make it clear that nothing either contained in or omitted from the recommended language is intended to prohibit the use of public funds at private educational facilities. It is the Committee's recommendation that the education provisions speak only to the public educational system.

VI. COMMENTARY

Section 1. The State shall encourage the advancement of knowledge; wherefore, the General Assembly shall appropriate funds for a system of public education at all levels as it deems desirable, to foster, enhance and promote the intellectual, cultural and occupational development of the people.

This section is a general exhortation to the legislature to provide education at all levels. While continuing the sentiment deleted from the current Bill of Rights (Article 34), it also recognizes the expanded scope of public education since 1867 when state plans for provision of public education did not extend beyond the grade school level. While there is no mandatory or specific requirement, this paragraph is intended to grant implicit recognition of state support for kindergartens, adult educational programs, community colleges, state colleges, and all state-supported educational activities which is or may be carried on in the future.

Section 2. The General Assembly shall provide for a statewide system of free public schools sufficient for the education of, and open to, all children of school age.

This provision carries forward the substance of Article XIII, Section 1, of the present Constitution. Without doubt, the Committee feels that the State's obligation to provide free education on the elementary and secondary levels should be perpetuated in the constitution. This concept is best kept separate from that contained in proposed Section 1, as the latter is purely exhortatory.

> *Section 3. The University of Maryland shall be managed by the regents of the University of Maryland in accordance with law, and the regents shall have exclusive general supervision of the institution and the control and direction of all expenditures from the institution's funds.*

This section carries out the Committee's determination to propose constitutional "autonomy" for the University of Maryland. The section is phrased so that the General Assembly may impose reasonable restrictions on the methods used by the regents in managing the institution -- i.e., provisions similar to those contained in the present Autonomy Act that all income of the University be deposited in the state treasury, that there be an annual audit, etc. It is the Committee's opinion and intention that statutory implementation of this section will be limited by the language of the section so that the legislature might not ab initio impose restrictions in such areas as the selection and pay of personnel, the curriculum, or purchasing. It would only be after the fact of the employment, plan or expenditure that the law might require the

University to account for its funds, or treat employees which the University alone may hire and classify, in accordance with state standards for their classification.

Respectfully submitted,

Committee on Miscellaneous Provisions

LEAH S. FREEDLANDER, dissenting:

The Committee considered very carefully the language used in the "Section 1" proposed in its Fourth Report of July 6, 1966. This language resulted from detailed discussion over several meetings. The proposed "Section 1" presented in the Fourth Report reads:

> Section 1. The General Assembly shall provide for a statewide system of free public schools sufficient for the education of, and open to, all children of school age; and shall also provide for such other public educational institutions as may be desirable for the intellectual, cultural and occupational development of the citizens of this State.

This section includes in its entirety the provision recommended as "Section 2" in the majority report. The language of "Section 2" in the majority report is not objected to; however, its placement as separate from "Section 1" is objectionable.

"The State shall encourage the advancement of knowledge" states the obvious in today's society. Since this exhortatory language says nothing about the extent of the responsibility, there would appear to be little point in giving space to this nice objective.

"Wherefore" is a legalistic term which seems out-of-character with a constitution.

"The General Assembly shall appropriate funds for a system of public education at all levels, as it deems desirable" states a power inherent in the General Assembly. Moreover, the clause "as it deems desirable" completely negates the obligation denoted by "shall."

"To foster, enhance and promote" appears redundancy personified.

"The intellectual, cultural and occupational development" is desirable language in whichever first section that the Commission recommends.

"Of the people" is not nearly as specific as "of the citizens of this State" in defining the State's responsibility and objective. There is no objection to nonresidents benefiting from the State's educational system; however, it seems unnecessary to state any responsibility on the part of the State toward any persons other than the citizens of the State of Maryland.

The alternative suggested in the Fourth Report of the Committee on Miscellaneous Provisions states the responsibility of the General Assembly to "provide for a statewide system of free public schools sufficient for the education of, and open to, all children of school age." This sets forth a positive objective for the State to maintain a free secondary school

system designed to further the educational development of every youth to the extent of his ability. Unlike the majority report, this provision continues to recognize the responsibility of the State to operate a "free" secondary school system.

The second clause, "and shall also provide for such other public educational institutions as may be desirable for the intellectual, cultural and occupational development of the citizens of this State," states more positively the responsibility of the State to provide special educational programs for adult education, the education of the blind and deaf, the education of the retarded, the advancement of the exceptionally talented, etc. Such a provision would seem to more fully complement an educational article than its absence.

The recommended language in the Fourth Report seems to better encompass all levels of education while at the same time being more consistent with the Commission's policy of brevity and conciseness. It also provides for some free education while providing a system wherein the State may support some components in part and the benefiting citizens may support in part.

Respectfully submitted,

(Mrs.) Leah S. Freedlander

Maryland Room
University of Maryland Library
College Park, Md.

C O N S T I T U T I O N A L C O N V E N T I O N C O M M I S S I O N

SIXTH REPORT

OF THE

COMMITTEE ON MISCELLANEOUS PROVISIONS

Maryland Room
University of Maryland Library
College Park, Md.

October 24, 1966

RE: ARTICLE 1, SECTION 7; ARTICLE 3, SECTION 50; ARTICLE 3, SECTION 60; ARTICLE 7, SECTION 2; ARTICLE 15, SECTION 1; ARTICLE 15, SECTION 6; ARTICLE 15, SECTION 10.

INTRODUCTION

The Committee on Miscellaneous Provisions is recommending that all of the above referred to provisions, except Article 15, Section 6, be eliminated from the proposed new constitution. They will be discussed seriatum.

Article 1, Section 7.

> Every person, hereafter elected, or appointed, to office, in this State, who shall refuse, or neglect, to take the oath, or affirmation of office, provided for in the sixth section of this Article, shall be considered as having refused to accept the said office; and a new election, or appointment, shall be made, as in case of refusal to accept, or resignation of an office; and any person violating said oath, shall, on conviction thereof, in a Court of Law, in addition to the penalties now, or hereafter, to be imposed by Law, be thereafter incapable of holding any office of profit or trust in this State.

This section provides that, if an elected or appointed official refuses to take the oath of office provided for in Article 1, Section 6 (A similar provision is contained in the proposed constitution.

See Second Report of the Committee on Miscellaneous Provisions.), the office shall be considered vacant. The section also provides that, upon conviction for violating the oath provided for in Section 6, the officeholder would thereafter be incapable of holding any office of profit or trust.

A similar provision is contained in the Nebraska Constitution (Article 15, Section 1), in the Oklahoma Constitution (Article 15, Section 2), in the Pennsylvania Constitution (Article 7, Section 1), and in the Wyoming Constitution (Article 6, Section 21) that failure to take the oath of office causes a forfeiture. As noted in the Committee's Second Report, almost all states have an oath requirement similar to the one contained in Article 1, Section 6. No provision similar to Article 1, Section 7 is contained in the Model State Constitution. (See Section 1.07.)

It is the Committee's position that Article 1, Section 7 is unnecessary, in that, even without that section, failure to take the oath of office would result in a vacancy in the office. In Thomas v. Owens, 4 Md. 189 (1853), the Court of Appeals of Maryland held that a comptroller is not in office and hence not entitled to a salary until he qualifies by taking the oath prescribed in Article 1, Section 4 of the 1851 Constitution. In Archer v. State, 74 Md. 410 (1891), the court in effect stated that the treasurer was not legally in office when he failed to take the oath within the time required to "qualify" under Article 6, Section 5. It is apparent, therefore, that under the language of Article 1, Section 6 of the present Constitution, as well as the language of the new provision relating to the oath of

office, that the taking of the oath is a condition precedent to entering into office by the newly elected or appointed official. See also Davidson v. Brice, 91 Md. 681 (1900), and Keyser v. Upshur, 92 Md. 726 (1901), which indicate that a failure to take a statutory oath does not defeat the right to assume office with the implication that the failure to take the constitutional oath of office would defeat the right to take office.

It should be made clear that the removal, therefore, of Article 1, Section 7 is not intended to change the existing law with respect to the consequences of the failure to take the constitutional oath of office.

As noted above, Section 7 also provides that an officeholder convicted of violating the oath shall be incapable of holding any office of profit or trust. It is the Committee's feeling that this is a statutory matter which does not require constitutional status.

Article 3, Section 50.

> It shall be the duty of the General Assembly, at its first session, held after the adoption of this Constitution, to provide by Law for the punishment, by fine, or imprisonment in the Penitentiary, or both, in the discretion of the Court, of any person, who shall bribe, or attempt to bribe, any Executive, or Judicial officer of the State of Maryland, or any member, or officer, of the General Assembly of the State of Maryland, or of any Municipal corporation in the State of Maryland, or any Executive officer of such corporation, in order to influence him in the performance of any of his official duties; and, also, to provide by Law for the punishment, by fine, or imprisonment in the Penitentiary, or both, in the discretion of the Court, of any of said officers, or members, who shall demand, or receive any bribe, fee, reward, or testimonial, for the performance of his official duties, or for neglecting, or failing to perform

> the same; and, also, to provide by Law for compelling any person, so bribing, or attempting to bribe, or so demanding, or receiving a bribe, fee, reward, or testimonial, to testify against any person, or persons, who may have committed any of said offenses; provided, that any person, so compelled to testify, shall be exempted from trial and punishment for the offence, of which he may have been guilty; and any person, convicted of such offense, shall, as part of the punishment thereof, be forever disfranchised and disqualified from holding any office of trust, or profit, in this State.

The effect of this provision is to require the legislature to make it a crime to bribe or attempt to bribe any public official and further to require the legislature to make it a crime for any public official to demand or receive any bribe. Sixteen other state constitutions provide generally for the crime of bribery of public officials and seven of these states also provide for the crime of corrupt solicitation of public officials. The Committee feels that this is a statutory matter (see Article 27, Section 23 of the Maryland Code, 1957 Edition) which need not be given constitutional sanction.

Article 3, Section 60.

> The General Assembly of Maryland shall have the power to provide by suitable general enactment (a) for the suspension of sentence by the Court in criminal cases; (b) for any form of the indeterminate sentence in criminal cases, and (c) for the release upon parole in whatever manner the General Assembly may prescribe, of convicts imprisoned under sentence for crimes.

The Committee recommends that this provision be eliminated. In effect, it authorizes the General Assembly in criminal cases to provide for suspension of sentences, indeterminate sentences and parole. This section became a part of the Maryland Constitution

in 1915. The purpose of the section was to free from any constitutional objection legislation authorized by this provision. See Alfred S. Niles, Maryland Constitutional Law, Hepbron & Haydon, (1915) p. 219. It must be recognized that in 1915 there was some thought that without this provision legislation of this kind would violate the separation of powers doctrine. It is the Committee's position, however, that today no substantial question remains as to the constitutional validity of legislation providing for indeterminate sentences and release upon parole. The Committee obtained a written opinion letter from Attorney General Finan (now judge of the Court of Appeals of Maryland), stating that Section 60 of Article 3 "would not be required in order to enact appropriate statutes on the subject." A copy of Judge Finan's letter is attached hereto and made a part of this report.

The Committee also contacted Professor Francis A. Allen at the University of Chicago Law School requesting his opinion as to the necessity of this provision. Professor Allen replied in part:

> It is true that when such provisions were first being introduced into American statutory law, certain constitutional questions were raised in the courts. But it is my impression that in most jurisdictions these constitutional doubts have long since been overcome without constitutional amendment. I should think that no such special provision is required unless there is reasonable feeling that judicial attitudes that may have required Section 60 of the present constitution would again be expressed in the absence of comparable language.

The Committee also contacted Frank Kaufman, Esq. (now judge of the United States District Court for the District of Maryland), chairman of the governor's commission to study sentencing in criminal

cases. Judge Kaufman's opinion was that if the legislature has power to pass laws stating minimum and/or maximum lengths of sentences it would also have the power to provide for parole, probation and indeterminate sentences. Judge Kaufman further stated that the fact that all judicial powers are conferred upon the judiciary would not be an inferential denial of the power of the legislature to prescribe sentences. In his opinion, the power to provide for parole, probation and indeterminate sentences is basically and historically within the legislative province. A copy of Judge Kaufman's letter is also attached hereto.

The Committee also was concerned with the possible effect that the elimination of Article 3, Section 60 would have on the Defective Delinquent Act (Article 31B, Maryland Code, 1957 Edition). The

NOTE: Page 7 and all pages thereafter of this report have been incorrectly numbered

... Volume 29, An Indeterminate Sentence Law for Defective Delinquents (1950), which expresses the view that Section 60 was not needed in order to authorize indeterminate sentences

As noted in Eggleston v. State, 209 Md. 504 (1956), at pp. 514-15, Article 3, Section 60 authorizes the enactment of an indeterminate sentence in criminal cases but, since the detention in Article 31B is civil in nature, this section is not strictly applicable. The court further pointed out that it has long been established that a state has the power to limit the liberty of persons found dangerous to the health and safety of the people. See also Salinger v. Superintendent, 206 Md. 623 (1955), at p. 629, where the court recognized

cases. Judge Kaufman's opinion was that if the legislature has power to pass laws stating minimum and/or maximum lengths of sentences it would also have the power to provide for parole, probation and indeterminate sentences. Judge Kaufman further stated that the fact that all judicial powers are conferred upon the judiciary would not be an inferential denial of the power of the legislature to prescribe sentences. In his opinion, the power to provide for parole, probation and indeterminate sentences is basically and historically within the legislative province. A copy of Judge Kaufman's letter is also attached hereto.

The Committee also was concerned with the possible effect that the elimination of Article 3, Section 60 would have on the Defective Delinquent Act (Article 31B, Maryland Code, 1957 Edition). The Committee concluded, however, that Article 3, Section 60 was not needed in order to authorize the defective delinquent law. Judge Finan is of the same opinion. See also Maryland Legislative Council, Research Division, Reports Volume 29, An Indeterminate Sentence Law for Defective Delinquents (1950), which expresses the view that Section 60 was not needed in order to authorize indeterminate sentences

As noted in Eggleston v. State, 209 Md. 504 (1956), at pp. 514-15, Article 3, Section 60 authorizes the enactment of an indeterminate sentence in criminal cases but, since the detention in Article 31B is civil in nature, this section is not strictly applicable. The court further pointed out that it has long been established that a state has the power to limit the liberty of persons found dangerous to the health and safety of the people. See also Salinger v. Superintendent, 206 Md. 623 (1955), at p. 629, where the court recognized

that the State has the power and the duty to care for insane persons who may be restrained or confined for the welfare of themselves and society under the general police powers with or without specific statutory right. In Meredith v. Director, 226 Md. 653 (1961), at p. 655, the Court of Appeals acknowledged that the Supreme Court of the United States has upheld various state laws providing for the indeterminate confinement of habitual criminals, citing Carlesi v. People of New York, 233 U.S. 51, and Graham v. West Virginia, 224 U.S. 616.

Constitutional provisions on the subject of indeterminate sentences aside from Maryland's are found in Article 5, Section 28 of the Michigan Constitution, which provides that the legislature may provide by law for indeterminate sentences, and in Article 8 of the Declaration of Rights of the Florida Constitution which prohibits indefinite imprisonment. (See also Missouri Constitution, Article 1, Section 31, and the Nevada Constitution, Article 5, Section 14.)

Article 7, Section 2.

> The qualified voters of each County, and of the City of Baltimore, shall, on the Tuesday next after the first Monday in the month of November, in the year nineteen hundred and fifty-eight, and on the same day in every fourth year thereafter, elect a Surveyor for each County and the City of Baltimore, respectively, whose term of office shall commence on the first Monday of January next ensuing their election, and whose duties and compensation shall be the same as are now or may hereafter be prescribed by Law. And any vacancy in the office of Surveyor, shall be filled by the Commissioners of the counties, or by the Mayor and City Council of Baltimore, respectively, for the residue of the term.

This section provides for the election of surveyors in each county and the City of Baltimore every four years. Prior to 1958 this section provided for election of surveyors every two years. The Committee is of the opinion that this is a statutory matter which should not be given constitutional sanction. Additionally, in line with the Commission's position to eliminate all unnecessary constitutional offices, the Committee recommends that this section be eliminated. See Article 91 of the Maryland Code which sets forth the duties of the office.

(Note: Article 7, Sections 4 and 5 originally assigned to this Committee relate to the commissioner of the land office. By virtue of the Laws of 1956, Chapter 489, there will be on the November ballot a proposal to abolish this office at the end of the term of the present incumbent. The Committee agrees with this position that this office ought to be eliminated and no further recommendation on this subject is therefore made.)

Article 15, Section 1.

> Every person holding any office created by, or existing under the Constitution, or Laws of the State (except Justices of the Peace, Constables and Coroners), or holding any appointment under any Court of this State, whose pay, or compensation is derived from fees, or moneys coming into his hands for the discharge of his official duties, or, in any way, growing out of, or connected with his office, shall keep a book in which shall be entered every sum, or sums of money, received by him, or on his account, as a payment or compensation for his performance of official duties, a copy of which entries in said book, verified by the oath of the officer, by whom it is directed to be kept, shall be returned yearly to the Comptroller of the State for his inspection, and

> that of the General Assembly of the State, to which the Comptroller shall, at each regular session thereof, make a report showing what officers have complied with this Section; and each of the said officers, when the amount received by him for the year shall exceed the sum which he is by Law entitled to retain, as his salary or compensation for the discharge of his duties, and for the expenses of his office, shall yearly pay over to the Treasurer of the State the amount of such excess, subject to such disposition thereof as the General Assembly may direct; if any of such officers shall fail to comply with the requisitions of this Section for the period of thirty days after the expiration of each and every year of his office, such officer shall be deemed to have vacated his office, and the Governor shall declare the same vacant, and the vacancy therein shall be filled as in case of vacancy for any other cause, and such officer shall be subject to suit by the State for the amount that ought to be paid into the Treasury.

Article 15, Section 1 provides that any officeholder whose compensation is derived from fees shall keep an account book, make a report to the comptroller, and, of course, pay over the excess of any fees over his salary to the treasurer. Failure to do so within 30 days constitutes a forfeiture of the office. Prior to 1956 this section put a maximum of $3,000 on the salary of any person (except justices of the peace, coroners and constables) who received compensation by virtue of fees derived from the office. While there are many cases in the Court of Appeals construing this provision, it is the Committee's feeling that this is strictly a statutory matter and should not be given constitutional sanction. A similar, although less extensive, provision is contained in the Illinois Constitution (Article X, Section 13).

Article 15, Section 6.

> The right of trial by Jury of all issues of fact in civil proceedings in the several Courts of Law in this State, where the amount in controversy exceeds the sum of five dollars, shall be inviolably preserved.

This provision, along with Article 5 and Article 23 of the Declaration of Rights, secures the right of trial by jury of all issues of fact in civil proceedings at law. (The Sixth Report of the Committee on Elective Franchise and Declaration of Rights dated August 21, 1966, does not discuss the right to a trial by jury as provided in Article 5 and Article 23, and that Committee did not include such a provision in the proposed new Declaration of Rights.)

The Committee on Judicial Administration of the Maryland State Bar Association recently recommended that this provision be retained but that the $5.00 minimum be raised to $500.00. (See page 20 of the separately bound report of that committee prepared for the 71st annual meeting of the Maryland State Bar Association.) Seven states specifically provide in their constitutions for the right to a trial by jury without establishing a monetary minimum amount in controversy (Indiana, Maine, Massachusetts, Virginia, North Carolina, Georgia and Idaho). Five additional states specifically provide in their constitutions for the right to a trial by jury with a small monetary minimum amount in controversy (Oregon, Hawaii, West Virginia, New Hampshire and Alabama). Twenty-nine other states provide for the right to trial by jury in civil cases in various ways.

The historical importance of the right to trial by jury in civil proceedings cannot be denied. The Maryland Constitutional

Convention of 1776 adopted without debate or comment the provisions of the Declaration of Rights relating to the right to trial by jury in civil proceedings. These provisions, which have remained unchanged since their adoption, are found now in Article 5 and Article 23 of the Declaration of Rights. It was not until 1851 that a provision for jury trials was included in the Maryland Constitution proper. It was added in order to place beyond all question "the great safeguard and bulwark of security for property and persons" since Article 5 of the Declaration of Rights allowed revision and amendment by the legislature. See Debates of the Maryland Constitutional Convention, Volume 2, p. 767 (1851).

Recognizing its historical importance and its widespread existence today, the Committee recommends that this provision be modified as hereinafter provided and, as modified, retained in the constitution.

It must be remembered, however, that the "constitutional guarantee of a trial by jury extends only to the type of cases in which the right of trial by jury existed at the time of the adoption of the Constitution." Pennsylvania v. Warren, 204 Md. 467 (1954), at p. 474. Therefore, where the proceeding did not exist at common law, for example, in lunacy proceedings (Matter of Easton, 214 Md. 176 (1957)) and suits to enforce the right created under the Uniform Reciprocal Enforcement of Support Act, the parties do not have the right to a jury trial. Further, only those cases arising "at law" and not in equity give rise to the right to a jury trial; for instance, actions for specific performance of a contract, domestic relations matters, and other injunctive proceedings do not give rise

to the right of a trial by jury. The Court of Appeals has also found that where the legislature abrogates a common law cause of action and replaces it with a different form of remedy no right to a jury trial exists. See Branch v. Indemnity Insurance Co., 156 Md. 482 (1929), where the court recognized that the right to a trial by jury did not exist under the Workmen's Compensation Act. This constitutional right does prevent the legislature from conferring upon the equity courts jurisdiction to determine legal rights which have historically been exercised by courts of law (McCoy v. Johnson, 70 Md. 490 (1889)) and also prevents the legislature from conferring upon the Court of Appeals the power to review questions of fact as well as of law (Shellfish Commissioners v. Mansfield, 125 Md. 630 (1915)).

The Committee therefore recommends that the right to a jury trial in civil cases as now exists be included in the constitution and further recommends that no dollar amount be put on this right, since dollar figures become outdated very rapidly.

The Committee recommends the following language:

> *Every person shall have the right of trial by jury of issues of fact in civil proceedings in the several law courts in the State.*

This provision should be a part of the Declaration of Rights. The Committee suggests that it be an addition to Section 4 of the proposed declaration.

Article 15, Section 10.

> Any officer elected or appointed in pursuance of the provisions of this Constitution, may qualify,

> either according to the existing provisions of law, in relation to officers under the present Constitution, or before the Governor of the State, or before any Clerk of any Court of Record in any part of the State; but in case an officer shall qualify out of the County in which he resides, an official copy of his oath shall be filed and recorded in the Clerk's office of the Circuit Court of the County in which he may reside, or in the Clerk's office of the Superior Court of the City of Baltimore, if he shall reside therein. All words or phrases, used in creating public offices and positions under the Constitution and laws of this State, which denote the masculine gender shall be construed to include the feminine gender, unless the contrary intention is specifically expressed.

This section provides how officers may qualify and where the executed oath is to be filed. By virtue of an amendment in 1922, it also provides that when the masculine gender is used in creating public offices and positions, it shall be construed to include the feminine gender unless the contrary intention is expressed. This provision was not in the 1864 Constitution and has never been considered by the Maryland Court of Appeals. Judge Niles, in his text on Maryland Constitutional Law, at page 344, states that the provision is plain and seems to require no comment. Related statutory material is contained in Article 17, Sections 70 to 72, and in Article 36, Section 12. No provision has been found in any other state constitution regarding the method of qualification, but provisions for filing of the oath with various state officials (such as clerks and secretary of state) are contained in the Colorado Constitution (Article 12, Section 9), the Oklahoma Constitution (Article 15, Section 2), the Pennsylvania Constitution (Article 7, Section 1), and the Wyoming Constitution (Article 7, Section 21).

It is the Committee's position that this provision is not necessary and should not be given constitutional sanction. There seems to be no valid reason why this matter could not be handled by statutory enactment.

Respectfully submitted,

Committee on Miscellaneous Provisions

THOMAS B. FINAN
ATTORNEY GENERAL

ROBERT C. MURPHY
DEPUTY ATTORNEY GENERAL

STATE OF MARYLAND
STATE LAW DEPARTMENT
ONE CHARLES CENTER
BALTIMORE, MD. 21201

December 13, 1965

Mrs. Maurice P. Freedlander
2405 West Rogers Avenue
Baltimore, Maryland 21209

Dear Mrs. Freedlander:

I have your letter of December 9, 1965, with respect to the provisions of Section 60 of Article 3 of the Constitution of Maryland.

I shall, of course, be happy to assist you in your capacity as a member of the Governor's Constitutional Revision Commission, in your study of the constitutional provision in question. As I am sure you know, this Section was evidently designed to protect the existing statutory provision from attack on the ground that it violates the separation of powers doctrine. See State v. Fisher, 204 Md. 307.

It appears to me, however, that the present indeterminate sentence provisions in existing statutes are constitutional, notwithstanding Section 60 of Article 3, and that this constitutional provision would not be required in order to enact appropriate statutes on the subject.

I am referring a copy of this letter to Mr. Thomas Garland, Assistant Attorney General, with the request that he assist you should you wish to avail yourself of the facilities of this office in connection with your study.

Sincerely,

Thomas B. Finan

Thomas B. Finan
Attorney General

TBF:ihh
cc:Thomas Garland, Esquire

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April 12, 1966

Lewis A. Noonberg, Esquire
Reporter, Miscellaneous Provisions Committee
Constitutional Convention Commission
700 Mercantile Trust Building
Baltimore, Maryland 21202

Re: Article 3, Section 60

Dear Lewis:

I have your letter of March 25, 1966. The Governor's Commission to Study Sentencing in Criminal Cases did not, I am afraid, engage in any detailed research concerning the constitutional question which I believe your aforesaid letter poses. It is my understanding that the members of the Commission assumed that if the Legislature has the power to pass laws stating minimum and/or maximum lengths of sentences for specified crimes, it also has the constitutional power to provide for criminal sentence review of the type the Commission recommended. I would think, while the matter was not specifically discussed by the Commission, that the same view would seem to apply to the power of the Legislature to provide for parole, probation and indeterminate sentences.

You will remember that since I received your letter of March 25, 1966, you and I have orally discussed this matter. In line with that discussion, I would not think that if the Constitution confers all judicial powers upon the judiciary, there would be any inferential denial of the power of the Legislature to prescribe sentences. The power to set minimum and maximum sentence limitations, and to provide for parole, probation and indeterminate sentences would seem to me to be basically and historically within the legislative province.

I hope that I have, in some measure, replied satisfactorily to your letter of March 25th. If not, I certainly will appreciate it if you will give me a call.

With kindest personal regards,

Sincerely,

Frank A. Kaufman

cc: Mrs. Elsbeth L. Bothe

Maryland Room
University of Maryland Library
College Park, Md.

C O N S T I T U T I O N A L C O N V E N T I O N C O M M I S S I O N

SPECIAL REPORT

OF THE

COMMITTEE ON MISCELLANEOUS PROVISIONS

Maryland Room
University of Maryland Libra
College Park, Md.

October 24, 1966

RE: EDUCATIONAL PROVISIONS

Pursuant to the direction of the Commission at its meeting on October 15, 1966, the Committee on Miscellaneous Provisions submits, without recommendation, three alternative suggestions giving the University of Maryland something less than the complete autonomy previously recommended by the Committee.

> The University of Maryland shall be the state university. The General Assembly shall provide that the management of the university shall be the responsibility of the Board of Regents of the university, which board shall thereafter have exclusive supervision of the internal affairs of the university until such authority is withdrawn by the General Assembly.

The purpose of this provision is to give the University of Maryland complete automony subject to the right of the legislature to withdraw it.

> The General Assembly shall enact no law which shall in any way impair or affect the control by the University of Maryland of its operation or of any of the studies pursued therein, or impair or in any way affect the power to fix the standards of scholarship required for admission to the University of Maryland or for the continued prosecution of studies therein, or the examination or other

> method of ascertaining or determining such fitness in scholarship or otherwise, or the power to maintain, prescribe and enforce the discipline, rules and regulations of the university.

This is based upon Article 77, § 283, Annotated Code of Maryland, 1965 Replacement Vol., relating to the state scholarship program which includes private colleges.

> The University of Maryland shall be managed by the regents of the University of Maryland in accordance with law, and the regents shall have power to formulate policy, and to exercise control over the university.

This is based on the provisions as contained in the Alaskan and Hawaiian constitutions.

Respectfully submitted,

Committee on Miscellaneous Provisions

Maryland Room
University of Maryland Library
College Park, Md.

C O N S T I T U T I O N A L C O N V E N T I O N C O M M I S S I O N

SEVENTH REPORT

OF THE

COMMITTEE ON MISCELLANEOUS PROVISIONS

November 21, 1966

Maryland Room
University of Maryland Libr
College Park, Md

RE: CONSTITUTIONAL REVISION

Article XIV of the present Maryland Constitution contains the provisions for amending the Constitution. It itself has been amended on two occasions* and now provides:

> Section 1. The General Assembly may propose Amendments to this Constitution; provided that each Amendment shall be embraced in a separate bill, embodying the Article or Section, as the same will stand when amended and passed by three-fifths of all the members elected to each of the two Houses, by yeas and nays, to be entered on the Journals with the proposed Amendment. The bill or bills proposing amendment or amendments shall be published by order of the Governor, in at least two newspapers, in each County, where so many may be published, and where not more than one may be published, then in that newspaper, and in three newspapers published in the City of Baltimore, once a week for four weeks immediately preceding the next ensuing general election, at which the proposed amendment or amendments shall be submitted, in a form to be prescribed by the General Assembly, to the qualified voters of the State for adoption or rejection. The votes cast for and against said proposed amendment or amendments, severally, shall be returned to the Governor, in the manner prescribed in other cases, and if it shall appear to the Governor that a majority of the votes cast at said election on said amendment or

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* Chapter 476, Acts of 1943, ratified November 7, 1944, and Chapter 99, Acts of 1956, ratified November 6, 1956.

amendments, severally, were cast in favor thereof, the Governor shall, by his proclamation, declare the said amendment or amendments having received said majority of votes, to have been adopted by the people of Maryland as part of the Constitution thereof, and thenceforth said amendment or amendments shall be part of the said Constitution. When two or more amendments shall be submitted in manner aforesaid, to the voters of this State at the same election, they shall be so submitted as that each amendment shall be voted on separately.

Section 2. It shall be the duty of the General Assembly to provide by Law for taking, at the general election to be held in the year nineteen hundred and seventy, and every twenty years thereafter, the sense of the People in regard to calling a Convention for altering this Constitution; and if a majority of voters at such election or elections shall vote for a Convention, the General Assembly, at its next session, shall provide by Law for the assembling of such convention, and for the election of Delegates thereto. Each County, and Legislative District of the City of Baltimore, shall have in such Convention a number of Delegates equal to its representation in both Houses at the time at which the Convention is called. But any Constitution, or change, or amendment of the existing Constitution, which may be adopted by such Convention, shall be submitted to the voters of this State, and shall have no effect unless the same shall have been adopted by a majority of the voters voting thereon.

The Committee recommends that this article be eliminated and the following be put in its place:

Section 1. Amendments to this Constitution may be proposed either by an affirmative record vote of three-fifths of the members of each house of the General Assembly or by a majority vote of a constitutional convention called by the General Assembly. In either case, the amendments so proposed shall be submitted to a popular vote, and unless they otherwise provide, shall become

effective thirty days after approval by a majority vote of those voting thereon at any special or general election as determined by the General Assembly. Such popular vote shall be preceded by due notice thereof as provided by law.

Section 2. The General Assembly, by an affirmative record vote of three-fifths of the members, may at any time submit to the voters the question of the calling of a constitutional convention. If the question of calling a convention shall not have been submitted to a popular vote for a period of twenty years, then it shall be submitted at the next general election. In either case a convention shall be held within one year of the date of approval by a majority of the voters voting thereon. Within sixty days of such popular approval, the governor shall appoint a commission to prepare proposals to lay before the convention. At its next session following such vote the General Assembly shall provide for the assembling of the convention, and the selection of its delegates. The convention shall provide its own rules of procedure. Any proposals for changing the constitution adopted by the convention shall be submitted to the qualified voters of the State for ratification, and shall be effective only after approval by a majority of those voting thereon.

The Committee reviewed the provisions contained in Article XIV of the Maryland Constitution and in Article XII of the Model State Constitution. A draft submitted by Mr. Gentry was also considered. Dr. Winslow was then invited to attend one of the Committee's meetings to give us his views. The present language is in large measure a result of his suggestions.

Section 1.

A. Proposal of Amendments. The Committee's draft, similar to the Model, permits the proposal of amendments by both the legislature and the consititutional convention. Unlike the Model, however, the Committee's proposal does not provide for the proposal of constitutional amendments directly by the people through the use of the initiative. Approximately thirteen states have provisions for use of the initiative.

Although the Committee desired to provide fairly liberal amendment procedures, it feels that an extraordinary majority (three-fifths) of the legislature ought to be required to propose constitutional amendments. A majority of state constitutions require extraordinary majorities of one amount or another in one or both houses. In some states two consecutive legislatures must act before an amendment may be proposed.

B. Ratification of Amendments. As noted in the comments to Section 12.02 of the Model, ratification by the voters is required in every state except Delaware,

where affirmative action by two consecutive legislatures is sufficient. The Committee has no doubt that a popular referendum is the proper method of ratifying any constitutional change.

Also in conformity with the Model, the Committee feels that approval by a majority of those voting on the question should be sufficient for ratification. Although some states require approval by a majority of those voting in the election, the Committee feels that this would be unwise. As Dr. Winslow pointed out to the Committee, the median vote, both for and against, for the 16 constitutional questions on the ballot in Maryland this year was only 30% of the total vote cast for governor.

The Committee did not establish a minimum time lapse between the time the proposal is made and the vote as does the Model. The Committee's draft merely requires that it be preceded by "due notice . . . as provided by the General Assembly."

Section 2.

Constitutional Conventions. Although it appears clear that the legislature has the inherent power at any time to propose that a constitutional convention be held, the Committee thinks it desirable to specifically include such a clause (as is done in the Alaskan Constitution and the Model) along with the requirement for periodic calling of the question (see Section 2 of Article XIV) in order to give specific recognition to this important prerogative.

As noted in the comments to Section 12.03 of the Model, if the need is imminent, presumably the legislature will submit the question of calling a convention to the voters. The Committee's draft does, however, attempt to guarantee that the question will periodically be raised by providing, as does the Model, for the submission of the question without legislative action. This is an important change from Section 2 of Article XIV.

The timetable provided by Section 2 of the Committee's draft obviously is designed to insure that a convention is held within a reasonable time following approval by the voters. Specific recognition is given to the preparatory commission since pre-convention preparation has become such an important part of constitutional revision procedures. (See Model State Constitution, Section 12.03(b).)

The vote necessary to ratify the convention's proposals is, as in the case of calling the convention, a simple majority of those voting on the question.

Respectfully submitted,

Committee on Miscellaneous
Provisions

Maryland Room
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C O N S T I T U T I O N A L C O N V E N T I O N C O M M I S S I O N

EIGHTH REPORT

OF THE

COMMITTEE ON MISCELLANEOUS PROVISIONS

Maryland Room
University of Maryland Library
College Park Md.

December 3, 1966

RE: ARTICLE IV, SECTION 13,
AND ARTICLE XV, SECTION 11.

I. Article IV, Section 13. Form for Commissions and Grants, etc.

Section 13 of Article IV provides:

> Section 13. All Public Commissions and Grants shall run thus: 'The State of Maryland, etc.,' and shall be signed by the Governor, with the Seal of the State annexed; all writs and process shall run in the same style, and be tested, sealed and signed, as heretofore, or as may hereafter be, provided by Law; and all indictments shall conclude, 'against the peace, government and dignity of the State.'

This provision originated as Article LVII of the Maryland Constitution of 1776 and prescribed a form for laws passed by the General Assembly as well as a form for commissions and grants, writs and indictments. This provision was continued in the Constitution of 1851 as Section 7 of Article IV without the prescription for the form of laws passed by the General Assembly. The language contained in Section 7 is almost identical to the present language. This provision was carried forward as Section 16 of Article IV of the 1864 Constitution and finally became Article IV,

Section 13 of the present Constitution. It has not been amended since its inclusion in the 1867 Constitution.

Only one case has been found which refers to this section and that is the case of State v. Dycer, 85 Md. 246 (1897), which held without any discussion of the background of Section 13 that the last part of the section relating to indictments was mandatory. The court stated that an indictment which did not contain the prescribed concluding phrase would be dismissed.

Although the Model State Constitution does not contain a section similar to this, many other states' constitutions do. Thirty-four states aside from Maryland provide a form for public commissions in a manner similar to Maryland. Fifteen states aside from Maryland provide a form for public grants in a manner similar to Maryland. Twelve states aside from Maryland provide a form for the conclusion of indictments similar to Maryland, and thirty-five states aside from Maryland provide a form for the beginning of writs and process (summons, subpoena, etc.) similar to Maryland.

While the Committee recognizes the value of prescribing a form for these public documents, it does not feel that all this need be contained in the constitution. The Committee's position is that the prescribed form for writs and process and indictments are purely formalities and could best be handled either by statute or court rule. However, the Committee does feel that, in light of the fact that commissions evidence title to public office and grants

evidence title to property, a prescribed form for these documents should be retained in a new constitution. The Committee, therefore, recommends that the provisions be amended to read:

> *All public commissions and grants shall be signed by the governor with the seal of the State annexed.*

The Committee further recommends, subject to approval by the Committee on the Executive Department, that this provision be placed in the executive article.

II. Article XV, Section 11.

Section 11 of Article XV provides:

> Section 11. No person who is a member of an organization that advocates the overthrow of the Government of the United States or of the State of Maryland through force or violence shall be eligible to hold any office, be it elective or appointive, or any other position of profit or trust in the Government of or in the administration of the business of this State or of any county, municipality or other political subdivision of this State.

While the Committee recommends that this section be eliminated from the new constitution, the Committee was also of the opinion that the inclusion or exclusion of this section presents a policy question to be decided in the first instance by the Commission. The Committee's recommendation recognizes that this provision is somewhat superfluous, since the constitutional oath of office already

requires every person elected or appointed to any office of profit or trust to swear that he will support the state and federal constitutions. It is the Committee's position that this type of provision would more properly be handled through legislative enactment. It should be noted that only four states aside from Maryland have a constitutional provision prohibiting subversives from holding public office. (Idaho, Article VI, Section 3; California, Article XX, Section 19; Alaska, Article XII, Section 4; and Hawaii, Article XIV, Section 3).

The Committee was concerned, however, with the possible effect which the elimination of this section would have on the Maryland Subversive Activities Act (Article 85A of the Maryland Code) commonly referred to as the Ober Law. This concern arises because of the present Article 37 of the Declaration of Rights, the substance of which is contained in the Commission's proposed Article I, Section 6 and which prohibits the legislature from prescribing any oath of office other than the constitutional oath of office as contained in Article I, Section 6. Specifically, the Committee's question was: Would the elimination of Section 11 of Article XV render the Ober Law unconstitutional? Mr. Kenneth Lasson, a student at the University of Maryland School of Law, prepared a memorandum on this issue for the Committee which is attached hereto as an appendix. As noted in the memorandum, the answer is far from certain, although the Committee tends to agree with Attorney General

Murphy that the Ober Law will not be rendered unconstitutional by virtue of the elimination of Section 11 of Article XV.*

Respectfully submitted,

Committee on Miscellaneous Provisions

* "It may be noted that Article 37 does not prohibit candidates for office from being required to make affidavits as to their qualifications. It has been the practice and custom and statutory requirement for many years to demand from candidates at the time of filing for office certificates under oath with respect to their various qualifications. Such provisions are set out in Article 33 of the Code, and these sworn certificates have never been considered as additional oaths of office. The filing of such certificates is made a prerequisite to the placing of a candidate's name upon the ballots or in the voting machines. (Art. 33, Sec. 53(a) as enacted by Chapter 425 of the Acts of 1949). Their requirement is a method by which the legislature is executing what has been held to be its inherent power to safeguard elections. Kenneweg v. Allegany County Commissioners, 102 Md. 119, 62 A. 249; Munsell v. Hennegan, 182 Md. 15, 31 A. 2d 640; Hennegan v. Geartner, 186 Md. 551, 47 A. 2d 393. The purpose is to keep from the ballots and voting machines the names of those who are ineligible for office." Shub v. Simpson, 196 Md. 177 at 188 (1950). Query: Would this rationale apply to persons appointed to hold a public office? There is also the question as to whether even with Article XV, Section 11, the Ober Act violates Article 37 of the Declaration of Rights. See dissenting opinion of Judge Markell at pp. 198-206 of 196 Md. An attack on the Ober Law based on the federal constitution is now pending before the Supreme Court of the United States in Whitehill v. Elkins, October Term, 1966.

C O N S T I T U T I O N A L C O N V E N T I O N C O M M I S S I O N

COMMITTEE ON MISCELLANEOUS PROVISIONS

MEMORANDUM

BY

KENNETH LASSON

November 10, 1966

RE: THE OBER LAW AND ARTICLE XV, SECTION 11
OF THE MARYLAND CONSTITUTION

In order to sustain the legality of a statute requiring loyalty oaths, must the provisions of the Maryland Constitution which prescribe an oath of office and prohibit the legislature from prescribing additional oaths be supported by a further constitutional provision which denies the right to hold public office to anyone who advocates the overthrow of the government by force or violence?

Article 37 of the Maryland Declaration of Rights states, in part:

> . . . nor shall the Legislature prescribe any other oath of office than the oath prescribed by this Constitution.

That oath is contained in Article I, Section 6 of the Constitution proper:

> Every person elected, or appointed, to any office of profit or trust, under this Constitution, or under the Laws, made pursuant thereto, shall, before he enters upon the duties of such office, take and subscribe the following oath, or affirmation: I, _____, do swear, (or affirm, as the case may be), that I will support the Constitution of the United States; and that I will be faithful and bear true allegiance to the State of Maryland,

> and support the Constitution and Laws thereof; and that I will, to the best of my skill and judgment, diligently and faithfully, without partiality or prejudice, execute the office of _____, according to the Constitution and Laws of this State (and, if a Governor, Senator, Member of the House of Delegates or Judge), that I will not directly or indirectly, receive the profits or any part of the profits of any other office during the term of my acting as _____.

The Maryland Subversive Activities Act (Md. Code, Art. 85A, 1949), commonly referred to as the Ober Law, contains various provisions designed to safeguard against sedition and other subversive activities. Section 13 of the Act requires every state employee "to make a written statement which shall contain notice that it is subject to the penalties of perjury, that he or she is not a subversive person as defined in this article." The employee who either fails to execute such a statement or admits to being subversive "shall immediately be discharged." Section 15 provides the requirement that candidates for election file affidavits that they are not "subversive persons."

The relative merits of the arguments pro and con, regarding the (federal) constitutionality of the loyalty oath, will not be considered in this memorandum.[1] The only question at hand is, does the constitutional prohibition against prescribing other oaths render the Ober oaths illegal, or are they saved by virtue of Article XV, Section 11? The latter reads:

> No person who is a member of an organization that advocates the overthrow of the Government of the United States or of the State of Maryland through force or violence shall be eligible to hold any office, be it elective or appointive, or any other position of profit or trust in the Government of or in the administration of the business of this state or of any county, municipality or other political subdivision of this State. (Ratified November 2, 1948.)

It is apparent that Article 37 of the Declaration of Rights does not preclude the constitutionality of the oath requirement for non-elective or non-appointive offices (e.g., employees such as school teachers) found in Section 13 of the Ober Law. The application of Article 37 is to all other offices, whether created by the Constitution or by act of the legislature. Davidson v. Brice, 91 Md. 681, 690 (1900). Thus Section 11 of Article XV of the Constitution is not needed to sustain the validity of Section 13 of the Ober Law when it applies to employees (as distinct from officers).

[Section 15 of the Ober Law, however, concerns only elected officials. Those who are appointed, if they are to be included (as we might assume they are) within the scope of the anti-subversive act, would necessarily come under the purview of Section 13 (as do employees) Since they are holders of offices of trust or profit, even though not elected, they would also be covered by Article 37 of the Declaration of Rights. Therefore both elective and appointive officers must be treated as the same when determining if the Ober Law can stand without Article XV, Section 11.]

In Shub v. Simpson, 196 Md. 177, 76 A.2d 332 (1950), appeal dismissed, 340 U.S. 881 (1951), Section 15 of the Ober Law was attacked primarily on the ground that it required an oath of office additional to the one provided by the Maryland Constitution and was, therefore, invalid under the Article 37 prohibition. The Court of Appeals did not share that view. It held that Section 15 of the Ober Law required not an oath but merely an affidavit of qualification[2] for office which would implement Article XV, Section 11 of the Constitution. 196 Md. 177,at 189. The appellants in Shub, however, further contended that the affidavit required under Section 15 of the Act (for candidates)

went far beyond the scope of Article XV, Section 11 of the Constitution; the Ober oath, it was argued, encompassed committing, attempting to commit, advocating, abetting, advising, etc., the alteration of the government by peaceful revolution and, moreover, membership in foreign organizations dedicated to peaceful revolution. The court dismissed this contention, stating:

> It is quite clear from the connotation that "revolution" as used in Section 15 does not mean a peaceful revolution, but means a revolution accomplished by force or violence. These words are to be construed together. 196 Md. 177, at 191.

It was held that the purposes of Section 11 of Article XV of the Constitution, and the Ober Law, are identical and thus are to be taken together to effect that purpose. 196 Md. 177, at 192.[3]

The question immediately at hand, however, remains without solution. Although Section 15 of the Ober Law is viewed as necessary for the implementation of Article XV, Section 11 of the Maryland Constitution (196 Md. 177, 190), is the latter (constitutional) provision necessary in order to sustain the constitutionality of the former (statutory) provision? On this specific point the court in Shub v. Simpson, supra, is unclear.[4]

Conclusion

Since the court in Shub v. Simpson, supra, relied so heavily upon an equation of the purposes of Article XV, Section 11 of the Maryland Constitution, and Section 15 of the Ober Law, the implication exists that the two are interdependent. However, the court also stressed the theory that the Ober oath is not an oath at all, but rather an "affidavit of qualification for office." Under this view,

the Ober Law standing alone (without Article XV, Section 11) would not contravene Article 37 of the Declaration of Rights.

There has been no relevant ruling by the attorney general.[5] As yet the question continues to compel, but lack, a definitive answer.

N O T E S

1. The issues involving First Amendment freedoms, due process, etc., are dealt with at length elsewhere. See Shub v. Simpson, 196 Md. 177, 76 A.2d 332 (1950); Prendergast, Maryland: The Ober Anti-Communist Law, in THE STATES AND SUBVERSION 140 (Gellhorn, ed. 1952); BROWN, R. S., JR., LOYALTY AND SECURITY (1958); BRYSON, J. E., LEGALITY OF LOYALTY OATH AND NON-OATH REQUIREMENTS FOR PUBLIC SCHOOL TEACHERS (1963).

2. An "affidavit," as defined in Black's Law Dictionary, is "a written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before an officer having authority to administer such an oath. Cox v. Stern, 170 Ill. 442, 48 NE 906, 62 Am.St.Rep. 385; Hays v. Loomis, 84 Ill. 18. A statement or declaration reduced to writing, and sworn to or affirmed before some officer who has authority to administer an oath or affirmation. Shelton v. Berry, 19 Tex. 154, 70 Am.Dec. 326 . . . ."

3. The court did not come to grips with the argument that, by virtue of a provision unique among American constitutions, the people of Maryland are called upon to reform the old or establish a new government when "the ends of Government are perverted." Article 6 of the Declaration of Rights reads:

> That all persons invested with the Legislative or Executive powers of Government are the Trustees of the Public, and, as such, accountable for their conduct. Wherefore, whenever the ends of Government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the People may, and

> of right ought, to reform the old or establish a new Government; the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish and destructive of the good and happiness of mankind.

One might assert that even an affidavit of qualification for office would offend the above-quoted constitutional declaration.

4. Professor Sanford Rosen of the University of Maryland School of Law is of a similar opinion (that the court's disposition of the particular question is unclear).

5. Mr. Robert C. Murphy, Deputy Attorney General, has "no difficulty" in resolving the question: the Ober Law can stand on its own strength and does not need the support of Article XV, Section 11 of the Maryland Constitution.

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